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January 4 2011
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CLERK OF THE SUPREME COURT
STATE OF MONTANA

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CLERK OF THE SUPREME COURT
STATE OF MONTANA

January 3, 2011

Montana Supreme Court
Justice Building
215 N. Sanders
P.O. Box 203001
Helena, MT 59620-3001

Re: Limited Scope Representation

To the Honorable Supreme Court Justices of the State of Montana:

Limiting the scope of a lawyer's involvement in a legal proceeding may impact domestic relation matters more than any other area of the law. The recent surge of unrepresented parties in all legal matters certainly has been noticed by the courts in Western Montana. My personal informal survey indicates that at least half of the parties in domestic relations cases are unrepresented. My informal survey appears consistent with the national statistics where in three or four out of every five cases, one of the two parties is unrepresented. Obviously, some consumers of the legal services are deciding that in certain cases, a lawyer's advice, counsel and document preparation is not worth the cost.

I practice mainly family law and I support the proposed rule changes even though doing so may have an adverse economic impact on my law practice. My basic support for the rule changes comes from a perspective that I've not seen in the literature. I support the rule changes to allow limited scope representation because I think people should have the absolute, inalienable right to control their personal lives and included within that right should be their ability to make their own personal consumer decisions about how much legal representation they want and how much they want to pay for it. Let's not forget that they legal system does not belong just to lawyers; it belongs to all citizens of the United States. The legal system exists to resolve the disputes between its citizens, not disputes between lawyers. Lawyers don't own the legal system. The court system is paid for with tax dollars. Citizens should be able to access their justice system on their terms, not the lawyer's terms, and citizens should be able to determine the type and extent of the legal services that they would like.

We, as a profession, should not put any dampers on citizens which may prevent them from obtaining the amount of legal services they decide that they want. The legal system is a monopoly. People have no other legal remedies to ultimately resolve their issues, problems and disputes except through our complex legal system. If someone wants to represent themselves in the legal arena, they should be able to make that personal choice. I don't think lawyers should tell

non-lawyers that they can't seek the advice of trained legal professionals to help them with their questions! If anyone, (and it shouldn't matter the level of a person's intellectual abilities, or their economic status, or whether their chosen course of action may be ill advised), wants to represent themselves, they should be able to do so and to decide how much time and money they want to spend learning the legal system's rules. After all, it's their case and their life—not the lawyer's. If we would prohibit people that choose to represent themselves from seeking the advice of licensed Montana lawyers, then what's left for them? Doing their own research at the law school, or more likely, doing their own research on the internet and using unreliable, generalized information in their case that is probably ineffective thus further bogging down the court system and frustrating the judiciary? I cannot understand how it could ever be a "bad thing" that a self represented litigant has secured more accurate knowledge from a licensed attorney about their claim so that their case is better presented to a tribunal for determination. It should make no difference whatsoever where that knowledge comes from. My position is consistent with ABA Formal Opinion 07-446, which states that the fact that a litigant submitting legal documents to a tribunal on a pro se basis has received legal assistance behind the scenes is not material to the merits of the litigation. The position also appears to be consistent with common sense.

There is apparently some concern that lawyers will not dispense competent legal advice if they limit the scope of their involvement with a pro se litigant. The concern is speculative. There is no evidence that I've seen suggesting that a lawyer will shirk their professional obligations to a client and to the legal system just because they will only be paid, as an example, for 5 hours of work instead of 10 hours, or whatever the numbers might be. Good lawyers wouldn't do that, and really, why would they? This concern is spurious. Therefore, I think the proposed change to Rule 1.1 on Competence is satisfactory.

To the extent there is some of the confusion regarding the role attorneys should play with unrepresented litigants, I think that confusion might come from the blending in the discussion of two distinct areas of the practice—the first being oral discussions and advice that lawyers give over the phone or in person; and the second being written documents filed with the court. Family law lawyers are constantly asked for advice about an array of issues from "should I have my children in counseling," to "is it worth having a house appraised," to "can I start dating now", to "how will the judge decide?" In those discussions, I believe good lawyers will not only discuss the legal implications of the question, but also the practical implications that would include psychological, economic, and social impacts on both parties and their children. Lawyers use to be called counselors. The label was appropriate because lawyers were generally very knowledgeable about a lot of issues, probably because they read more than the average person. People sought a lawyer's advice and counsel on lots of issues and used that advice and counsel as reference points for their own decision making. Of course, now the legal profession has become very specialized. Lawyers use to practice in every area that they wanted; now lawyers are lucky to have two or three fields they can be knowledgeable about. But lawyers still engage in meaningful and thoughtful conversations with people seeking general input on an array of different problems that they are encountering, and people pay lawyers to engage in these very limited consultations. Thus, I don't see how oral discussions between lawyers and people seeking general advice or advice about a specific topic from lawyers could ever be limited and I

think Rule 1.2 on Scope of Representation and Allocation of Authority Between Client and Lawyer recognizes this distinction, but it needs to go a little further.

The proposed rule provides that informed consent does not need to be confirmed in writing if the representation of the client consists solely of a telephone consultation.[1] I'm not sure of the distinction between having a discussion over the phone, which could take place at any time with the attorney on an office phone, cell phone or home phone, versus having an oral consultation in person at a lawyer's office or at some other place which happens frequently. My suggestion would be to modify Rule 1.2 (1) (i) to state: "the representation of the client consists solely of telephone consultations or in person consultation," or another alternative, which I like better, might be: "the representation of the client does not consist of document preparation".[2]

The issue of ghost writing documents is more interesting, but still not a reason not to allow limited scope representation. Obviously, numerous legal forms are available on the internet, along with Montana's own pro se forms. I've wondered how it could be a disservice to the client or the legal profession if a lawyer makes needed revisions to one of these forms thus making it a better document. It probably can't be a disservice.

The more interesting problem is a lawyer ghost writing a brief for an unrepresented client. The Montana Ethics Committee's Opinion 101216 asserts that a lawyer should provide limited background advice and counseling to a pro se litigant, but should not provide more "extensive services" such as drafting ("ghostwriting") litigation documents which they assert would generally be misleading to the court and other parties. First, I don't understand why doing so is misleading, and second, and more important, what is the resulting harm? There seems to be no known harm from a lawyer helping someone with their legal documents. Further, where is the line drawn in the Ethic Committee's critique? Is any editing of a document ghostwriting? What about reorganizing the arguments or suggesting a particular argument be made that maybe wasn't in the original document? I have clients of all levels of sophistication and some of them can research and write quite well. There is simply not one level of service that I provide to all clients. In family law, every client has different needs. Some of them want to research the law. I encourage them to do so because it helps the client understand what the issues may be in their case and it makes them stronger witnesses. I copy pertinent cases for most of my clients to read. What if I did that for a pro se client who was writing their own brief and wanted me to review but not write the brief? Would that effort constitute "more extensive services" and subject me to discipline? I think ghostwriting should be allowed because I don't think you can effectively limit what an attorney can advise on a legal document and further, there isn't any discernable harm that can come from it, and if there is, that harm does not outweigh the benefit that comes from increasing the quality of the legal pleadings. We lawyers should not write rules that control the amount of service that pro se litigants can ask for from lawyers; that level of service should

[1] (i) states that "the representation of the client consists solely of telephone consultation." It seems that the word "a" should be inserted before "telephone" or the word "consultation" should be made plural. If the word "a" is inserted, then you have the question about whether more than one phone consultation should result in a written confirmation).
[2] The next issue for discussion would be email inquiries, texts and contacts made through social networking systems but frankly I haven't had time to think through suggestions about these forms of communication but they seem to be in the same category as oral communications.

be decided between the pro se litigant and the lawyer. Again, I don't see any disservice to the client or the legal profession by having lawyers make suggestions on how to better organize the facts, law and arguments in a brief.

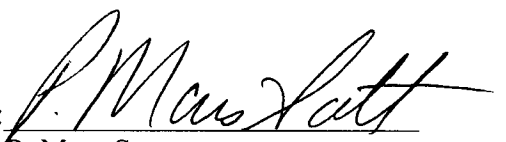
The potential problem I see with ghost writing a brief is oral argument. If the legal analysis has been intricate and complex, can a lay person argue the finer points of the brief, or defend their position against a hostile court? I can see judges becoming frustrated with someone who has no idea how one argument might be related to another issue. I suppose the answer is that if the litigant can't defend the legal position to satisfaction of the court, then they lose, just like a client loses if a lawyer doesn't defend their legal position to the satisfaction of the tribunal.

I have another thought. Many people I talk with have a very limited idea of what "going to court" means. A lot of people have the impression that if they go to court, they will have some type of informal roundtable discussion with the judge about this problem, or that they can just send a letter to the judge explaining their position, or that they can have their witness send a statement to the judge and if it's notarized, the witness doesn't need to appear in court. Would it be advisable that if someone is representing themselves, that the clerks of court put them on notice that they are bound by the same court rules as attorneys, and that judges are not there to protect their legal rights but that the judge's job is to make decisions based upon the facts and the law? In other words, pro se litigants should be put on notice before they get to court that the judge will not protect rights if the litigant doesn't follow certain procedures. Then if judges enforced the court rules instead of giving latitude to self represented litigants, people might be able to better assess what services they need from lawyers to protect their rights. Doing so might sort out the simpler legal problems from the more complex, serious matters by putting a reasonable person on notice that if the potential litigation could have serious implications, they should seek the advice of a lawyer.

Thanks for the opportunity to comment on the proposed limited scope representation rule changes.

Sincerely,

P. MARS SCOTT LAW OFFICES

By: 
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